IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 489

PITTSBURGH PLATE GLASS COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Opinion Below.

The opinion of the Court of Appeals (which is printed as Appendix A) has not yet been reported. No opinion was filed by the District Court.

Jurisdiction.

The judgment of the Court of Appeals is dated and was entered on October 6, 1958 (Appendix A). Jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) (1952).

Questions Presented.

1. In the trial of a federal criminal action, when the principal witness for the prosecution stated that he had testified three times before the indicting grand jury upon matters covered by his testimony at the trial, was it reversible error for the trial judge upon motion duly made to deny to the defendants, for use in cross examination, inspection of the transcripts of the grand jury testimony of that witness?

2. Was a price announcement by petitioner three days after price announcements of an identical amount made by others pursuant to an alleged express agreement among such others sufficient by itself to permit under §1 of the Sherman Act a criminal conviction of participation by petitioner in such agreement, both knowledge and participation being inferred under the concept of "conscious parallelism" from the mere fact of petitioner's announcement?

Statutes Involved.

The conviction was under §1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U. S. C. §1 (1952), printed in full in Appendix B. The so-called *Jencks* statute, 18 U. S. C. §3500 (Supp. V, 1958), though basically irrelevant, was discussed by the Court of Appeals and appears in Appendix A as footnote 1 to the court's opinion (pages 9a-10a).

Statement of the Case.

On March 26, 1957 an indictment was returned by a grand jury in Roanoke, Virginia. It alleged that the petitioner Pittsburgh Plate Glass Company (hereinafter called "PPG") and six other corporate and three individual defendants beginning in or about October 1954 and continuing thereafter had conspired in unreasonable restraint of trade to fix the prices of plain plate glass mirrors sold in Virginia and North Carolina to furniture manufacturers in violation of §1 of the Sherman Act. One of the individual defendants was PPG's manager of plate glass sales, W. A. Gordon, who was acquitted at the close of the Government's case (App. 301-2).* He was the only defendant acquitted.

The trial began on November 18, 1957. The Government's case related wholly to the events of a single week, from October 25 to November 1, 1954; and the Government disclaimed any proof of a continuing conspiracy (App. 71, 78).

Testimony was presented about the 1954 annual meeting of the Mirror Manufacturers Association at Asheville, North Carolina, during that week. PPG was not a member of the Association, although it manufactured mirrors in a small way at its warehouse at High Point, North Carolina (App. 645). PPG's main role in the mirror industry was that of a supplier of plate glass to mirror manufacturers, mirrors being made by applying silver to one side of a piece of plate glass and protecting the silver with a coating. Accordingly, the meeting was attended by PPG factory plate glass sales representatives, W. A. Gordon and

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* All references are to the printed appendix to appellants' briefs below, copies of which are filed with this petition.

some of his assistants, who were there to sell plate glass. They were the only PPG employees present. Gordon's duties as manager of plate glass sales bore no relation to the pricing of mirrors, and he had no responsibility at all for operations at PPG's warehouse at High Point, North Carolina (App. 51-4), the only one of PPG's many units which the Government claimed was involved in the conspiracy to fix mirror prices. No one whose duties related in any way to the pricing or sale of mirrors at the High Point warehouse was present at any time at the Asheville meeting, nor is there any evidence of any communication to the High Point warehouse by anyone during the week in question.

The Government relied on three incidents to tie PPG to the conspiracy. No evidence was presented of any causal relationship among these three incidents. Two of the three incidents, moreover, hinged entirely on the testimony of a single witness, A. G. Jonas, president of Lenoir Mirror Company. He was the Government's principal witness. He testified at the trial that he had conspired with some of the defendants; he had previously testified before the grand jury; and neither he nor his company was indicted.

The first of the three incidents was a telephone conversation between Jonas and Gordon. According to the evidence presented by various witnesses there had been prior to the Association meeting a severe price war. By the time of the meeting, however, an upturn in the furniture business coincident with a shortage of plate glass had made a price rise appear imminent. Accordingly there was talk among some of the mirror manufacturers present at the Asheville meeting of raising prices. Jonas, who was not a member of the Association and was not present at the meeting, testified that upon hearing of the talk he asked

that Gordon call him. He felt that Gordon as a close personal friend would tell him the truth about the matter (App. 237). Gordon called him and told him that he had heard general discussion of price increases (App. 237, 244-5). Jonas testified, however, that Gordon did not try to tell him what he should or should not do about raising prices (App. 238). At the close of the Government's case Gordon was acquitted on the basis that nothing in the testimony indicated that he "participated in this price raising business, or suggested the price to be fixed, or did anything of the sort" (App. 288). The trial court subsequently instructed the jury that he dismissed Gordon because he "could find nothing to indicate that he was a participant in any agreement or plan to raise prices" (App. 504).

The second incident was an alleged telephone call from Jonas to one of Gordon's assistants in Pittsburgh, Sam J. Prichard (App. 248-9), which Prichard on the stand emphatically denied (App. 303-6). Following the Association meeting, Jonas and certain of the defendants met on October 28, 1954 at a restaurant called "The Bluffs". PPG was not present or represented in any way. Jonas testified that at this meeting the whole question of an agreement on price hinged on him, and that finally those present agreed to send out letters on October 29 raising the price (App. 243-6). Others present at the meeting denied that an agreement had been reached (App. 205, 228). Jonas testified that he undertook at this meeting to report the outcome to PPG (App. 247), and that he called Prichard the next day and asked him to tell Gordon (App. 248-9) and called him again on November 1 and was told it had been reported (App. 249). As noted above, Prichard denied receiving any calls on this subject (App. 303-6). The trial court ruled that these calls were immaterial (App. 422-3) and so instructed the jury (App. 481).

At the close of Jonas' direct examination he testified in response to questions from the trial court and counsel for the defendants that he had appeared three times before the grand jury in Roanoke in 1956 and that his testimony there was on the same general subject matter as his testimony at the trial. PPG then moved for production of his testimony before the grand jury, and that motion was denied (App. 263-4). The record shows that the attorney for the Government had analyzed this grand jury testimony in preparing for Jonas' examination at the trial (App. 251).

The third incident was the bare fact that on November 1, 1954 the PPG warehouse at High Point, North Carolina, sent out a form letter announcing a price increase (App. 580-4) in an amount identical to that contained in letters sent out by other defendants on October 29 (in the case of one October 30). This warehouse was in no way subordinate to or the responsibility of Gordon or his assistant Prichard, and in any event as previously noted Gordon was acquitted by the trial court at the close of the Government's case (App. 301-2). The record is devoid of evidence that the warehouse manager had any knowledge of the events at Asheville or The Bluffs, much less agreed to join the conspiracy, which to the extent it existed had by November 1 already been consummated. It is clear from the record that it was on the sole basis of this form letter from the High Point warehouse, and without regard to the two incidents previously discussed, that the trial court denied PPG's motion for a judgment of acquittal (App. 386-7, 443-4, 473). On the basis of this price announcement the case was submitted to the jury with instructions of which the purport was that knowledge of the conspiracy could be inferred from the mere price announcement, and that sending the announcement with knowledge was equivalent to participation in the conspiracy. (App. 474-5, 512).

On December 3, 1957 the jury returned a verdict of guilty and a fine of $4,000 was imposed upon PPG. The Court of Appeals for the Fourth Circuit affirmed the judgment on October 6, 1958.

Reasons for Granting the Writ.

1. The question of whether a criminal defendant has a right of access to the grand jury testimony of witnesses against him at the trial for use in cross examination is one of major importance in the administration of criminal justice. Three courts of appeals have ruled upon this issue during the past two years, and their decisions are in conflict. Only a decision of this Court can determine the point.

2. What constitutes participation in conspiracy is an important question in a difficult area of criminal law generally and antitrust law in particular. The trial court and the Court of Appeals here have each espoused in somewhat different fashion the principle that, although "conscious parallelism" may not *per se* violate the Sherman Act, evidence of parallelism, whether conscious or unconscious, is sufficient to permit an inference of participation in an agreement in violation of the Sherman Act and thus to sustain a criminal conviction. To draw such a meaningless distinction is inconsistent with this Court's opinion in *Theatre Enterprises, Inc.*, v. *Paramount Film Distributing Corp.*, 346 U. S. 537. Further light from this Court is needed in this shadowy area, particularly with reference to the burden upon the prosecution in a criminal conspiracy case.

I.

The right of a criminal defendant to access at the trial to the grand jury testimony of a principal Government witness for use in cross examination is an important issue on which the courts of appeals are in conflict.

In 1957 this Court decided *Jencks* v. *United States*, 353 U. S. 657. The decision held that the defendant in that case was entitled to inspect reports made by two witnesses for the Government to the Federal Bureau of Investigation without laying a preliminary foundation of inconsistency. The opinion made several points important here:

(1) Requiring a preliminary showing of inconsistency is

> "to deny the accused evidence relevant and material to his defense * * * A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected" (353 U. S. 667-8).

(2) The defendant is entitled to inspect the reports to decide whether to use them, not merely to have the trial court inspect them.

> "Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accussed's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less" (353 U. S. 668-9).

(3) The practice of producing Government documents to the trial judge for his determination of relevancy and materiality is disapproved.

> "Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness" (353 U. S. 669).

(4) Executive privilege will not excuse production.

> "The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession" (353 U. S. 672).

The *Jencks* decision did not involve grand jury transcripts. The principles announced in the opinion, however, would appear as fully applicable to grand jury transcripts as to F. B. I. reports.

This conclusion was reached by the Court of Appeals for the Third Circuit shortly after the *Jencks* decision. In *United States* v. *Rosenberg,* 245 F. 2d 870 (3rd Cir. 1957), the trial court had denied a motion by the defendant to inspect grand jury testimony and an F. B. I. statement of a Government witness. Instead, in accordance with the prior practice, the court examined the documents and indicated to counsel wherein the witness' testimony in court differed. The Court of Appeals reversed the conviction *per curiam,* saying:

> "That practice has, however, now been definitely disapproved by the Supreme Court. Jencks *v.* United States, 1957, 353 U. S. ....., 77 S. Ct. 1007. The failure of the trial judge to permit counsel for the defendant to inspect at the trial the witness' grand jury testimony and statement to the F. B. I., as required by the rule announced in the Jencks case, compels us to grant a new trial" (245 F. 2d 871).

This decision is in direct conflict with the present decision in the Fourth Circuit here sought to be reviewed.

The next event was the enactment on September 2, 1957, 71 Stat. 595, of the so-called *Jencks* statute, 18 U. S. C. §3500, which appears as footnote 1 to the opinion in the present case printed as Appendix A. This statute is irrelevant, inasmuch as it does not purport to deal with grand jury testimony and the legislative history shows that it was not intended to do so. Its purpose was to codify the precise holding of the *Jencks* case as to statements made by a Government witness to agents of the Government, and thus to control the decisions of some lower courts which broadened the *Jencks* decision into the areas of pretrial discovery and indiscriminate production of executive files.

The Court of Appeals for the Second Circuit, however, in *United States* v. *Spangelet*, 258 F. 2d 338 (2d Cir. 1958), relied heavily, albeit somewhat ambiguously, upon this statute in upholding the trial court, who had himself inspected the grand jury testimony of the Government's principal witness rather than permitting counsel for the defendant to do so. The court stated:

> "We do not think the *Jencks* opinion may be read to apply to grand jury minutes. But this is an academic problem and need not delay us because after the *Jencks* case and before the trial in this case Congress enacted 18 U. S. C. A. §3500" (258 F. 2d 340).

The opinion then recites the legislative history as demonstrating that "Congress does not intend that grand jury minutes should be made available under the *Jencks* procedure." This history, however, as set forth in the opinion, shows only that Congress did not intend grand jury minutes

to be governed by the procedure prescribed in 18 U. S. C. §3500 but rather that Rule 6(e) of the Federal Rules of Criminal Procedure should continue to control disclosure. The court's reliance on the fact that the Senate Report on 18 U. S. C. §3500 referred to the *Rosenberg* case as a misinterpretation of the *Jencks* case is some indication of the confusion of the opinion. Obviously a legislative document cannot advance a construction of an opinion of this Court which will be binding on lower courts. At any rate, the court concluded that the defendant was not entitled to access to the grand jury testimony, but it preserved the right of the defendant to have the trial court read the grand jury transcript for inconsistencies.

The present decision by the Court of Appeals for the Fourth Circuit is equally confusing, and it effectively removes from the defendant any right at all to use the grand jury transcripts on cross examination, even on the basis of an inspection by the trial court. The court, unlike the Second Circuit, does not rely upon 18 U. S. C. §3500 in upholding the trial court's refusal to permit inspection of Jonas' grand jury testimony. Thus the opinion says:

> "But whatever uncertainty may have existed shortly after the decision in *Jencks*, it is now clear that the production of grand jury testimony is not governed by *Jencks* nor by the subsequent legislation, now 18 U. S. C. A. Sec. 3500, but by the Federal Rule of Criminal Procedure 6(e), which vests discretion in the trial court" (pp. 9a-10a, *infra*).

However, the authority for this statement is nothing but a listing of Second Circuit cases, of which the most recent cited is *United States* v. *Spangelet*. The opinion then gives the legislative history of the statute, including the characterization in the Senate Report of the *Rosenberg* case as a

misinterpretation of the *Jencks* case; and on no other basis than this the court concludes:

> "The practice which has been adopted in respect to the grand jury testimony of a witness does not contemplate the delivery of the transcript to defense counsel without any prior inspection by the Judge" (p. 10a).

There follows a two-page discussion saying in substance that it is impossible to formulate any rule as to when the trial court should inspect the transcript for inconsistencies and that it is in general undesirable for him to do so because of the burden and because it

> "would draw him too deeply into the partisan task of preparing the cross-examination. From time to time instances may arise in which it will appear to the judge wise and just to read the transcript to check a particular point sharply in issue, but the minute examination, during the trial, of elaborate grand jury minutes should not be expected of him" (pp. 11a-12a).

Thus, for all practical purposes, the court has ruled that a defendant has no right even to an inspection of the transcript by the trial court, a position in direct conflict with the Third Circuit rule and also inconsistent even with the Second Circuit rule.

Neither the Second nor the Fourth Circuit attempted to deal with the points in the *Jencks* decision quoted above. The considerations as to the basic standards for the administration of criminal justice set out in that decision clearly apply to grand jury testimony as fully as they do to statements of witnesses in executive files. Indeed, they apply more fully. Grand jury transcripts are court papers, whose use is expressly placed under the control of the

district court by Rule 6(e). It would seem particularly illogical and unjust to hold that the defendant, although he must be given access to unsworn statements of witnesses in executive files, cannot have access for use in cross examination to witnesses' prior testimony before the grand jury. Such a rule would preserve these court papers for the private use of the prosecutor at the trial and "deny the accused evidence relevant and material to his defense" (353 U. S. 667).

This result could be justified only by holding grand jury secrecy to be of a much higher order than executive privilege. However, none of the traditional reasons for secrecy of grand jury proceedings, as enumerated for example in *United States* v. *Rose,* 215 F. 2d 617, 628 (3d Cir. 1954), appears applicable at all in the situation of the witness on the stand at the trial. Certainly these reasons do not outweigh the requirements of justice described in the *Jencks* opinion.

The traditional standard as to disclosure of grand jury testimony is that stated in *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 233-234:

> "Grand jury testimony is ordinarily confidential. See *Wigmore, supra,* §2362. But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."

Disclosure of grand jury testimony is governed by Rule 6(e). The standard to be applied under that rule is that "the ends of justice require" disclosure. Also, the standards for the administration of criminal justice prescribed in the *Jencks* case must control on the issue of what justice requires. Clearly if "justice requires no less" than production of reports of Government witnesses to the F. B. I. on the subject matter of their testimony, as the *Jencks* case

holds, "the ends of justice require" the disclosure of testimony of witnesses before a grand jury on the subject matter of their trial testimony.

It would be difficult to postulate a stronger case of abuse of discretion than this one. Jonas was a self-confessed co-conspirator with some of the defendants. Although an instruction as to such a witness that his testimony should be received with caution has been repeatedly held to be generally desirable, the trial court here refused it (page 8a, *infra*), and instead commented favorably on his testimony (App. 502-3). The only company represented at The Bluffs not indicted was Jonas' company, and the trial court limited cross examination as to whether he had received a promise of immunity for his company from the Government attorney (App. 274). He was the only witness who testified that there was an agreement, and he was the only witness whose testimony had any bearing upon whether PPG had knowledge of the agreement. This particular testimony, moreover, relating to his alleged calls to Prichard, was emphatically denied by Prichard under oath. PPG's need for Jonas' prior testimony to use in cross examination was plain.

In *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 683, this Court said:

> "We do not reach in this case problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like.[7] Those are cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly."

"[7] See, *e. g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234. Cf. *Jencks* v. *United States*, 353 U. S. 657."

The present case is precisely such a one, involving as it does a single key witness for the Government.

We submit that the *Jencks* rule is applicable here. But in any event it cannot be denied that the issue is an important one, that the courts of appeals are in conflict, and that even those who reject the *Jencks* rule do not agree on their reasons for doing so nor on the defendant's right to inspection by the trial court. Clarification by this Court is needed.

II.

The decision of the Court of Appeals that a criminal conviction of participation in a price-fixing conspiracy can be sustained on the basis of a single price announcement promulgates an important principle of law inconsistent with this Court's statements on "conscious parallelism".

As is shown in the Statement of the Case and the record references, petitioner's case was submitted to the jury on the sole basis of its November 1, 1954 announcement of a price identical with prices announced three days earlier by persons attending the meeting at The Bluffs. The trial court's theory was that expressed in the following colloquy with PPG counsel:

> "Mr. Humrickhouse: * * * The mere sending of simultaneous price announcements is not sufficient to convict.
>
> "The Court: It is if the jury believes they were sent out as the result of some agreement, and they themselves are the evidence of the concerted action" (App. 387).

The jury was not entitled to "believe" anything of the sort without other evidence; such a "belief" would be sheer

speculation. Yet the instructions to the jury as a whole show that this was the theory on which the case was submitted (App. 493-517).

The instructions also show that the jury was told that it need only infer *knowledge* of the conspiracy, or perhaps only of the fact that the others had sent out letters, in order to convict. Thus with regard to PPG and another defendant in the same position who was also convicted the court instructed:

> "The evidence on these defendants is somewhat different. I did not want to start commenting on the evidence, but I think it would be, in fairness to say that on the Pittsburgh Plate Glass Company, it largely revolves around the sending out of that letter establishing the 78-2 discount.
>
> "The same is true as to Mr. Weaver or of the Weaver Mirror Company. Mr. Weaver himself has said it was a pure coincidence that he happened to send it out. If you believe that the letter that Mr. Weaver sent out, dated October 29th, in which he fixed the 78-2 discount, if you believe that the sending of the letter on that particular date and fixing the same discount as everybody else was a pure coincidence, that he knew nothing about an agreement on the part of the others, he would not be guilty.
>
> "He would not be guilty unless he did these things or participated in these things with some understanding that he was acting in conjunction with the others. The same would be true of the Pittsburgh Plate Glass Company" (App. 474).

The jury was thus told that from the sending of the price announcement by PPG it could infer knowledge, and that sending the announcement with knowledge was participation in the conspiracy. Yet, since there was nothing in the record to show knowledge, from proof of *unconscious*

parallelism the court permitted the jury to infer conscious parallelism and from conscious parallelism to find conspiracy.

The Court of Appeals, in affirming, by a somewhat different rationalization arrived at the same result. The court ignored the instructions actually given to the jury. It dealt with the sufficiency of the proof by reciting the three incidents described above in the Statement of the Case and reaching the following conclusion:

> "Since conscious parallel business behavior *per se* does not establish a violation of the Sherman Act, *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 541 (1954), *affirming* 201 F. 2d 306 (4 cir., 1953), proof that PPG announced a price rise identical with that announced almost simultaneously by its competitors was not enough by itself to convict. However, PPG 'conscious parallelism,' in light of its apparent close connection with the climax of the conspiracy, reasonably permitted the jury to infer that PPG sent the letters pursuant to an agreement with some or all of the conspirators" (pp. 4a-5a).

The incidents relating to Gordon and Prichard are surely too trivial to be characterized properly as a "close connection with the climax of the conspiracy." Entirely apart from this, however, the jury under the instructions it was given could not have relied upon those incidents, and we submit that it was improper for the Court of Appeals to ignore the actual posture of the case before the jury in deciding what the jury was "reasonably permitted • • • to infer."

Thus with reference to an earlier instruction that "Jonas' testimony is in no way denied in any substantial particular" (App. 502-3), after PPG had pointed out

Prichard's contradiction of Jonas' testimony about the telephone calls, the trial court instructed the jury:

> "I considered it, I had that in mind, but I considered it immaterial inasmuch as I had dismissed Mr. Gordon from the case. I didn't think attempts of Mr. Jonas to communicate with him were of importance" (App. 508).

Prichard, of course, was never claimed to have any role except as a conduit of information to Gordon. The court instructed the jury with respect to the acquittal of Gordon:

> "Gentlemen, as you know, during the course of this case I dismissed the indictment as to Mr. Gordon, because, as I told you then, I could find nothing to indicate that he was a participant in any plan or agreement to raise prices" (App. 504).

It is thus apparent that, in convicting, the jury relied solely on the price announcement and the instructions given with respect to it based on the trial court's theory of conscious parallelism. The conclusion of the Court of Appeals was, therefore, incorrect on the basis of the record. More than that, even assuming the record was as the court stated, its conclusion was incorrect as a matter of law.

In *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 540-41, this Court said:

> "The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. [Citations] But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously

> parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."

The Court of Appeals expressed its agreement with this statement. If it had analyzed correctly the basis upon which the case at bar was submitted to the jury, it necessarily would have reversed the trial court.

However, even if the trial court had instructed, as the Court of Appeals opinion tacitly assumes, that in determining whether the announcement was sent pursuant to conspiracy the jury should give full consideration to the evidence relating to Gordon and Prichard—despite Gordon's acquittal and despite the fact that Gordon's duties did not relate to the pricing of mirrors at the High Point warehouse—still there was not a proper basis for conviction.

The most that all the evidence as to Gordon and Prichard could be deemed to show was that PPG had knowledge of an agreement to announce a price rise arrived at among some of its competitors at The Bluffs, and that the High Point warehouse, with this knowledge, sent out an announcement of an identical price. The most the evidence could possibly sustain would be an inference that this was "conscious parallelism" rather than unconscious parallelism. Even this inference is a very strained one, inasmuch as there is not a scintilla of evidence in the record that the High Point warehouse manager, who actually wrote the announcement (App. 58), had any knowledge of The Bluffs or that he received any communication from anyone.

There is absolutely nothing in the record to indicate that "PPG sent the letters pursuant to an agreement with some or all of the conspirators", in the words of the Court

of Appeals, unless sending a price announcement with knowledge that others have sent similar price announcements pursuant to agreement *ipso facto* makes one a party to the agreement.

There is no suggestion whatever in the record that PPG had any knowledge that there was to be a meeting at The Bluffs. No representative of PPG attended the meeting. Jonas testified that it was his own agreement that the whole thing hinged upon (App. 236-7). From his testimony it is plain that any agreement reached there was made without regard to PPG's attitude, which is only natural inasmuch as PPG's High Point sales were the smallest of any defendant and only 3.9% of the combined sales of all the defendants (App. 538, 541, 552, 555, 559, 564, 645). Also, all that Jonas undertook to do or did, according to his testimony, was to "report the outcome of the meeting" to PPG (App. 247). In whatever he did he was wholly a volunteer; there was no evidence that Gordon or anyone else at PPG asked him to report the outcome of the meeting.

By the time the High Point price announcement was sent all the other defendants had already sent out their announcements—whatever agreement was reached at The Bluffs had been consummated. It is understandable that High Point would send out an announcement upon learning that others had done so. As the Court of Appeals noted, an upswing in price was imminent because of economic conditions (page 3a). It is hard to see, however, why High Point would *agree* with the others to send it. The others had already sent their announcements; there was no *quid pro quo* for High Point. Thus no inference of agreement by the PPG High Point warehouse is supported by anything in the record. The "agreement" which the Court of Appeals found on the basis of "PPG 'conscious paral-

lelism' " could only have been derived from the theory that PPG had knowledge of the agreement at The Bluffs, and that issuing the High Point price announcement with knowledge constituted agreement.

This position inherent in the opinion of the Court of Appeals—that one who increases his price in the same amount as an increase in price known by him to have been agreed upon by others thereby becomes a party to *their* agreement—presents so far as we can determine a novel problem upon which this Court has never passed. However, the principle announced in the *Theatre Enterprises* case that conscious parallelism is not conspiracy should extend to this situation.

If it is proper for a person to follow prices of a competitor or a group of competitors, as a matter of independent judgment, it must be proper for him to do so even if the others are conspirators, and even if he knows it. Otherwise the wrongful conduct of the conspirators in raising prices would place all other competitors in an impossible position, if any knowledge of the conspiracy came to them. If the innocent competitors did not continue to sell at perhaps ruinously low prices they would risk being branded as criminals. Their ordinary and lawful right to raise their own prices would be stripped from them because they had been told there was a conspiracy.

One could even postulate a call by one of the conspirators to an innocent competitor along these lines, "A group of us have agreed to raise prices, but we want to ask you to keep your price down so the thing will look better. However, you can join us by raising your price if you feel you must." The conspirator hangs up; and the competitor has become a criminal simply by answering the telephone, if mere knowledge is enough, because whether he changes his price or not he is acting pursuant to the conspiracy.

It should be noted that this is not a "concerted action" case like *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, and the many cases following it, where over a period of years competitors through uniform action formed a pattern upon which each relied. The present case involves a single price announcement.

The Court of Appeals, therefore, has given lip service to the principle that conscious parallelism is not in itself conspiracy, but upon analysis the opinion must be deemed to have held that consciously parallel action establishes participation in the conspiracy. We submit that this distinction is meaningless and that the court's decision is inconsistent with the *Theatre Enterprises* case. The trial court by permitting the jury through speculation to infer both knowledge of and participation in the agreement at The Bluffs from the bare price announcement even more clearly departed from the *Theatre Enterprises* rule. Proof of conspiracy and conscious parallelism are murky problems at best, and in this important area incorrect decisions should not be permitted to add further confusion.

Particularly in a criminal case, where guilt must be established beyond a reasonable doubt, conviction of conspiracy should not rest upon sheer speculation of the type which the courts below have indulged in. In *United States* v. *Di Re*, 332 U. S. 581, 593, this Court said, "Presumptions of guilt are not lightly to be indulged from mere meetings." The same principle should apply to a mere price announcement in itself innocent. This criminal conviction on such a basis emphasizes that further consideration by this Court of the problem of conscious parallelism is required.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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November 3, 1958.

Appendix A.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT.

No. 7585.

PITTSBURGH PLATE GLASS COMPANY,
J. A. MESSER, SR.,
GALAX MIRROR CO., INCORPORATED, and
MT. AIRY MIRROR COMPANY,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE.

(Argued June 2, 1958. Decided October 6, 1958.)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

CYRUS V. ANDERSON (LELAND HAZARD, JAMES B. HENRY, JR., W. P. HAZLEGROVE, GEORGE R. HUMRICKHOUSE, W. A. DICKINSON and RICHARD C. PACKARD on brief) for Appellant PITTSBURGH PLATE GLASS COMPANY; H. GRAHAM MORISON (SAMUEL K. ABRAMS and ROBERT M. LICHTMAN on brief) for Appellants GALAX MIRROR COMPANY, INCORPORATED, MOUNT AIRY MIRROR COMPANY, and J. A. MESSER, SR.; and DANIEL M. FRIEDMAN, Attorney, Department of

Justice (VICTOR R. HANSEN, Assistant Attorney General; SAMUEL KARP, RAYMOND M. CARLSON and ERNEST L. FOLK, III, Attorneys, Department of Justice, and JOHN STRICKLER, United States Attorney, on brief) for Appellee.

SOBELOFF, Chief Judge:

The indictment in this case charged a combination and conspiracy in unreasonable restraint of trade to fix prices for the sale of plain plate glass mirrors to furniture manufacturers in violation of Section 1 of the Sherman Act, 26 Stat. 209 (1890), as amended. All seven corporate and two of the three individual defendants were convicted. Appellants here are three of the convicted corporations, namely, Pittsburgh Plate Glass Company ("PPG"), Galax Mirror Company, Mount Airy Mirror Company; and one of the individuals convicted, J. A. Messer, Sr., chairman of the board of the latter two companies.

SUFFICIENCY OF THE EVIDENCE

The first question on this appeal is that raised by PPG. It contends that the evidence was insufficient to sustain the jury's verdict that PPG was a party to the conspiracy.

The proceedings in the District Court reveal the following salient facts. The corporate defendants manufacture plain plate glass mirrors in Virginia and North Carolina and sell interstate to furniture manufacturers. PPG is primarily a seller of plate glass to manufacturers, who produce mirrors by applying silver and protective coatings to one side of the glass. PPG also maintains a warehouse in High Point, North Carolina, where it manufactures and sells mirrors. List prices are uniform in the industry upon the mirrors, which are standardized as to size and shape. The actual selling price, however, is at a discount from the list price. Discounts usually range from 78% and above. Thus, the lower the discount, the higher the price.

In October, 1954, the annual meeting of the Mirror Manufacturers Association was held at Asheville, North Carolina. Even though PPG was not a member of the Association, its sales manager of plate glass, W. A. Gordon, and several of his assistants, were present in Asheville at that time. Also in Asheville were the appellant Messer and representatives of three of the corporate defendants which were convicted but did not appeal: Robert Stroupe, Kenneth Hearn and Ralph C. Buchan. Also present in Asheville was A. G. Jonas, president of Lenoir Mirror Company, which was not a member of the Association. Neither the Lenoir Company nor Jonas was indicted, and Jonas was the principal prosecuting witness.

Prior to the 1954 convention, there had been a severe price war, the impact of which upon the industry was accentuated by a decline in business. By the fall of that year, however, an up-swing in price was imminent due to a shortage of plate glass coincident with an increasing demand for mirrors by furniture manufacturers.

At Asheville, Messer, meeting with Hearn, Stroupe and Buchan, indicated an intention to raise his prices on mirrors to 78% off list. They telephoned Jonas, informing him that Messer wanted to raise his prices, and that everyone there was in agreement. Jonas expressed disbelief since Messer was well-known in the mirror industry as a price-cutter. Jonas requested that someone relay a message to PPG's Gordon to call him. Jonas testified that his purpose was to learn "if there was any truth in this matter." Gordon replied that "[i]n some of the rooms" he had "heard the fellows saying that they would like to get their prices increased," and although he wasn't trying to tell Jonas what he should do or not do, he thought that Jonas "ought to be getting more for the product than we were getting for" it.

The next day, Jonas, Buchan, Messer and Grady V. Stroupe (president of Stroupe Mirror Company) met at an inn called "The Bluffs" and agreed finally, in Jonas' words, "that 78 per cent was a fair price and we would go

along on that basis." In his testimony Jonas stated several times that it was his impression that the increase in price hinged on his assent, and if he "didn't come along, prices wouldn't be raised." Everyone agreed to send out letters around October 29 announcing the increase. Jonas said that he would report the outcome of the meeting to PPG. Accordingly, he reached Sam Prichard, Gordon's assistant, by phone on October 29, and Jonas' testimony was that he told Prichard of the agreement reached at The Bluffs and requested him to notify his superior in PPG, Gordon. Jonas further asserted that in a phone conversation with Prichard on November 1, the latter reported that the message had been conveyed to Gordon. Prichard denied emphatically any such calls from Jonas. The telephone bills of Lenoir Mirror Company, Jonas' employer, showed calls to PPG on the two dates on which Jonas claimed to have talked to Prichard. The telephone bill also showed additional calls to PPG during November.

On November 1, 1954, PPG sent a form letter to its customers announcing a price increase by reducing the discount to 78%. The other manufacturers had sent similar letters on October 29 announcing the identical increase, except Stroupe Mirror Company, whose letter went out on October 30.

The jury having found PPG guilty of participation in the conspiracy, the applicable rule in judging the sufficiency of the record to sustain the conviction is to consider it in the light most favorable to the prosecution. We may reverse only if we find that there was no substantial evidence, on the record as a whole, to support the verdict. *Carneal* v. *United States*, 212 F. 2d 20 (4 cir., 1954); *Garland* v. *United States*, 182 F. 2d 801, 802 (4 cir., 1950); *Jelaza* v. *United States*, 179 F. 2d 202, 205 (4 cir., 1950). Since conscious parallel business behavior *per se* does not establish a violation of the Sherman Act, *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 541 (1954), *affirming* 201 F. 2d 306 (4 cir., 1953), proof that PPG announced a price rise identical with that

announced almost simultaneously by its competitors was not enough by itself to convict. However, PPG "conscious parallelism," in light of its apparent close connection with the climax of the conspiracy, reasonably permitted the jury to infer that PPG sent the letters pursuant to an agreement with some or all of the conspirators. The proposition is too elementary to require elaboration, that participation in a criminal conspiracy need not be proved by direct evidence; "a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" *Glasser* v. *United States*, 315 U. S. 60, 80 (1942). In light of the facts enumerated, we cannot say that the conviction was without substantial basis.

Alleged Variance

The defendants are aggrieved by an alleged variance between the indictment and the proof, which they assert is fatal to the Government's case. The indictment, brought in March, 1957, charged that

> "11. Beginning in or about October, 1954, or prior thereto, the exact date being to the grand jurors unknown, and *continuing* thereafter, the defendants . . . have been engaged in a combination and conspiracy in unreasonable restraint of trade. . . .
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> "12. The aforesaid combination and conspiracy has consisted of a *continuing* agreement, understanding and concert of action among the defendants . . . to stabilize and fix prices . . . by agreeing upon and *applying* in pricing plain plate glass mirrors a uniform discount, the amount of which, from time to time, has been changed by agreement. . . .
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> "13. *During the period of time covered by the indictment and for the purpose of effectuating and carrying out* the aforesaid combination and conspiracy, the defendants by agreement, understand-

ing, and concert of action *have done things* which are hereinabove charged. . . ." (Emphasis supplied.)

The jury was instructed that a "continuing" conspiracy need not be proved; that the gist of the offense was a common understanding to fix prices; and that the Government need not prove that the agreement was effectuated, but only that the defendants entered into an agreement in violation of law.

The defendants contend that the charge in the indictment can be satisfied only by proof of a continuing agreement; and further that the trial judge's instructions to the jury limiting the required proof to a showing that a conspiracy was entered into, regardless of its duration, constituted an amendment of the indictment. However, the indictment charges the single crime of conspiracy. The act of conspiring to violate the Sherman Act is an offense, and it is immaterial whether or not the purpose of the conspiracy was ever effectuated. *Nash* v. *United States,* 229 U. S. 373, 378 (1913), and *United States* v. *Trenton Potteries,* 273 U. S. 392, 402 (1927). Likewise, it need not be proved that the conspiracy continued for the duration charged in the indictment. *Cooper* v. *United States,* 91 F. 2d 195, 198 (5 cir., 1937). Evidence that the conspiracy continued would be pertinent in this case only to indicate somewhat that the conspiracy was actually entered into and to help determine the severity of the penalty. Since the agreement itself constituted the offense, the additional allegation in the indictment that the conspiracy was "continuing" did not set forth an essential element of the crime. Disregard of this "continuing" feature was immaterial.

Rulings on Scope of Evidence

The defendants, however, claim prejudice from rulings restricting the testimony to a narrower range than the allegedly broad charge in the indictment. They say that their efforts in preparing for trial were concentrated on defending against a charge of a conspiracy continuing up

to the date of the indictment, March, 1957, and that when the trial judge ruled that the requirements of the indictment could be satisfied by proving the acts of October, 1954, and limited the evidence, they were in effect called upon to meet a "totally different case" than they had prepared to defend.

But the defendants in no way were misled, because they knew beyond question that the events of October, 1954, would be involved at the trial. They were not diverted from this essential issue, for they were prepared to meet the Government's case as to this. In no practical sense were they prejudiced.

The defendants prepared a comprehensive study of price fluctuations in the industry from 1954 up to March, 1957, the date of the indictment, to show the lack of uniformity in prices, thereby suggesting that the conspiracy was not carried out. The trial judge, however, ruled that he would limit the testimony on both sides to July 7, 1955, the effective date of a statute increasing the maximum penalty for violations of the Sherman Act from $5,000.00 to $50,000.00. 69 Stat. 282 (1955). By this ruling, the court restricted the introduction of the price fluctuation reports to July, 1955. This limitation was for the protection of the defendant, to avoid the possibility of a verdict based upon acts partly before and partly after the change in the penalty provision.

Evidence for the period after July, 1955, was too remote to have significant bearing on the issue of the defendants' participation in the conspiracy in the fall of 1954. Indeed, the defendants did not even avail themselves of the full scope of the judge's ruling, which would have allowed such evidence for the period up to July, 1955. They elected to present a price fluctuation chart only for the month of November, 1954, the month immediately following the Asheville meeting and the announcements of price increases.

The Court's rulings on the scope of the permissible testimony were not erroneous, and the defendants could not conceivably have been prejudiced by them.

Instructions to Jury

The trial Court's refusal of a requested instruction that Jonas' testimony should be received with caution in view of the fact that he was an accomplice or conspirator was not error. It has been repeatedly held that while such an admonition is generally desirable, its omission is not necessarily reversible error, *Caminetti* v. *United States*, 242 U. S. 470, 495 (1917), *Gormley* v. *United States*, 167 F. 2d 454, 457 (4 cir., 1948), *Hanks* v. *United States*, 97 F. 2d 309, 311, 312 (4 cir., 1938), for corroboration of an accomplice's testimony is not a requisite to conviction. *Caminetti* v. *United States, supra, Gormley* v. *United States, supra.* Moreover, Jonas' testimony was in many respects corroborated by other witnesses.

The contention that the instructions placed the burden of proof on the defendants and intimated to the jury that the Court believed Jonas is repudiated by the record. The Judge charged the jury that they were "the sole judges of the credibility of the witness and the weight you want to give to their testimony"; that he was "not vouching for [Jonas'] testimony," nor was he a "partisan of Mr. Jonas," and that it was for the Government to "prove . . . guilt beyond a reasonable doubt."

Grand Jury Testimony

After Government witness Jonas had said on cross examination that his grand jury testimony related "to the same general subject matter" as his testimony in court, the defendants moved for the production of the transcript of his grand jury testimony. In the absence of a preliminary showing of inconsistency between the two versions, the trial judge denied the motion. The defendants at no time requested the Judge to make a preliminary inspection of the transcript to ascertain whether there was inconsistency. On the contrary, they insist that they, and not the trial judge, are to determine the existence, *vel non* of inconsistency. The defendants rely on *United States* v. *Rosenberg*, 245 F.

2d 870 (3 cir., 1957), wherein the Court, feeling bound to apply the rule of *Jencks* v. *United States*, 353 U. S. 657 (1957), to grand jury testimony, held that the transcript should have been delivered directly to the defendant without prior examination by the Judge.

But whatever uncertainty may have existed shortly after the decision in *Jencks*, it is now clear that the production of grand jury testimony is not governed by *Jencks* nor by the subsequent legislation, now 18 U. S. C. A. Sec. 3500,[1] but

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[1] "Sec. 3500. *Demands for production of statements and reports of witnesses*

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court *in camera*. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required

by the Federal Rule of Criminal Procedure 6(e), which vests discretion in the trial court. *United States* v. *Angelet*, decided May 19, 1958, —— F. 2d —— (2 cir.); *United States* v. *Consolidated Laundries Corporation*, 159 F. Supp. 860, 862, 868 (S. D. N. Y., 1958); *United States* v. *Spangelet*, decided August 1, 1958, —— F. 2d —— (2 cir.). The Jencks case dealt with the production of FBI reports. The legislative history of the recent statute negatives the notion that Congress meant to assimilate the practice with respect to grand jury testimony to that made applicable to a witness' statement to the Government. The congressional committee expressly rejected "any interpretation of the Jencks decision which would provide for production of . . . grand jury testimony . . . ," and cited the Rosenberg case as a "misinterpretation" of the Jencks decision. Senate Report No. 981, 85th Cong., 1st Sess. The practice which has been adopted in respect to the grand jury testimony of a witness does not contemplate the delivery of the transcript to defense counsel without any prior inspection by the Judge. *United States* v. *Spangelet, supra; United States* v. *H. J. K. Theatre Corporation*, 236 F. 2d 502, 507, 508 (2 cir., 1956). The defendants' claim,

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for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595."

as broadly presented, is insupportable and was properly overruled. The Court did not exceed the proper limits of the sound discretion vested in it by Rule 6(e).

For good reasons, rooted in long experience, courts have shielded grand jury proceedings from unnecessary exposure.[2] This tradition of the law is not to be abandoned without clear legislative direction. Section 3500 does not profess to make, and cannot properly be read to require, any alteration in the practice concerning grand jury minutes. Rule 6(e) stands unaffected by recent decisions and legislation. This is not to suggest, however, that in a case of "particularized need" the secrecy of grand jury testimony may not be "lifted discretely and limitedly." *United States* v. *The Procter & Gamble Company,* decided June 2, 1958, 356 U. S. 672. When the circumstances seem to the Judge appropriate, he may make such inspection without necessarily requiring a prior showing of inconsistency. *United States* v. *Spangelet, supra.* If the Judge finds inconsistency, and deems it in the interest of justice to bring it to the attention of the cross-examiner, he may do so. If merely inconsequential deviations are found, he is not required to provide the cross-examiner a basis for ranging over a wide area of collateral and minute detail.

Even inspection by the trial judge, it must be recognized, has serious drawbacks. It would cast a heavy burden on the trial judge and seriously interrupt the trial for the Judge to attempt to ferret out inconsistencies in a lengthy transcript; he may not be able readily to absorb and evaluate every nuance in an extensive transcript. A further objection is that imposing this task on the Judge as regular procedure would draw him too deeply into the partisan task of preparing the cross-examination. From time to time instances may arise in which it will appear to the Judge wise and just to read the transcript to check a particular point sharply in issue, but the minute examination, during

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[2] The traditional reasons for the secrecy of grand jury proceedings have been frequently stated. They are succinctly set forth in *United States* v. *Rose,* 215 F. 2d 617 (3 Cir., 1954).

the trial, of elaborate grand jury minutes should not be expected of him.

After all, what we are dealing with is a problem of the fair scope of cross-examination, and the sound judicial discretion of the trial judge must be the chief guide. When the subject matter is one as delicate as grand jury testimony, no fixed rule can be formulated. The Judge should not be compelled to inspect in all cases; neither should he indiscriminately refuse, but he should exercise his judgment according to the circumstances. Certainly we could not approve any rule, such as contended for by the defendants here, requiring the automatic delivery of grand jury transcripts to defendants on demand.

The judgment is

Affirmed.

Judgment.

Filed and Entered October 6, 1958.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT.

No. 7585.

PITTSBURGH PLATE GLASS COMPANY, J. A. MESSER, SR., GALAX MIRROR CO., INCORPORATED, and MT. AIRY MIRROR COMPANY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEALS FROM the United States District Court for the Western District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

October 6, 1958.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

Appendix B.

United States Code, Title 15—Commerce and Trade.

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1—7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1—7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, ch. 647, §1, 26 Stat. 209; Aug. 17, 1937, ch. 690, title VIII, 50 Stat. 693.)